THE IMMUNITY OF CONSULS FROM THE PROCESS OF STATE COURTS. — International law gives to consuls, unlike diplomats,[1] no immunity from civil [2] or criminal [3] process. Although a consul is employed by a foreign power much as is a diplomat, yet he is not, on the one hand, as important a figure in international political relations; and he is more apt, on the other hand, to be concerned primarily with private transactions; so that it is convenient to subject him to the jurisdiction of local courts.[4] Nevertheless, a somewhat questionable policy of showing a certain peculiar respect [5] to consuls has led to the constitutional provision giving the Supreme Court original jurisdiction in cases affecting them.[6] This policy appears again in the statute [7] giving federal courts exclusive jurisdiction in proceedings, civil [8] and criminal,[9] against diplomats and

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of the American common law, that the drawee who accepted a raised check was not liable thereupon, or could recover the money paid to an innocent purchaser. See James Barr Ames, "The Doctrine of *Price* v. *Neal*," 4 HARV. L. REV. 287, 306; BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 225; 2 WILLISTON, CONTRACTS, § 1160. But the authorities have not been favorable to this view. McClendon *v.* Bank of Advance, 188 Mo. App. 417, 174 S. W. 203 (1915); Interstate Trust Co. *v.* United States Nat. Bank, 67 Colo. 6, 185 Pac. 260 (1919); National Reserve Bank *v.* Corn Exchange Bank, 157 N. Y. Supp. 316 (App. Div., 1916). National City Bank *v.* National Bank of the Republic, *supra*, is not necessarily contrary to these authorities, since it extends the estoppel of § 62, subsection 2, no further than to one who gives value, without notice, on the faith of the certification.

[1] See HERSHEY, DIPLOMATIC AGENTS AND IMMUNITIES, 102–165. For the difference between the two classes of representatives, see *In re* Baiz, 135 U. S. 403 (1890). The immunities of consuls in non-Christian countries are often, by treaty, much like those of diplomats in countries subject to our system of international law. See Mahoney *v.* United States, 10 Wall. (U. S.) 62, 66 (1869). See HALL, INTERNATIONAL LAW, 7 ed., 332 n.

[2] *In re* Baiz, *supra*. A consul acting as judge has, of course, judicial immunities. Haggard *v.* Pelicier, [1892] A. C. 61.

[3] The United States *v.* Ravara, 2 Dall. (U. S.) 297 (1793).

[4] See STOWELL, LE CONSUL, 177–180.

[5] See HALL, INTERNATIONAL LAW, 7 ed., 329–332; 1 OPPENHEIM, INTERNATIONAL LAW, §§ 434, 435. But see 8 OPINIONS OF THE ATTORNEY GENERAL, 169–175. In accord with this policy, particular immunities have been granted by the powers in treaties. *In re* Dillon, 7 Sawy. (U. S.) 561 (D. Cal., 1854) — (immunity from operation of *subpoena duces tecum*); United States *v.* Trumbull, 48 Fed. 94 (S. D. Cal., 1891) — (immunity from duty to testify); Kessler *v.* Best, 121 Fed. 439 (S. D. N. Y., 1903) — (privilege of official archives of consulate). Such immunities are often limited to consuls who are citizens of the countries they represent. See Börs *v.* Preston, 111 U. S. 252, 262–263 (1884).

[6] CONSTITUTION OF THE UNITED STATES, Art. 3, sec. 2.

[7] The provision appeared first in the Judiciary Act of 1789, 1 STAT. AT L. 77; 1875 U. S. REV. STAT., § 711, par. 8. See Börs *v.* Preston, *supra*. It was dropped from the statutes in 1875. 18 STAT. AT L. 318. The state and federal courts then had concurrent jurisdiction of proceedings against consuls. Wilcox *v.* Luco, 118 Cal. 639, 50 Pac. 758 (1897); Scott *v.* Hobe, 108 Wis. 239, 84 N. W. 181 (1900). The provision was reëmbodied in the statutes of 1911. 36 STAT. AT L. 1161.

[8] Sartori *v.* Hamilton, 13 N. J. L. 107 (1832); Davis *v.* Packard, 7 Pet. (U. S.) 276 (1833); 8 Pet. (U. S.) 312 (1834); Higginson *v.* Higginson, 158 N. Y. Supp. 92 (1916). The exemption was held inapplicable to actions *in rem*. Reclamation District *v.* Runyon, 117 Cal. 164, 49 Pac. 131 (1897) — (decided, in fact, when the provision was not in force). It was held inapplicable to a summons of a consul as garnishee. Kidderlin *v.* Meyer, 2 Miles (Pa. Dist. Ct.) 242 (1838). It applied to an attachment against a debtor consul. In the Matter of Aycinena, 1 Sandf. (N. Y.) 690 (1848).

[9] Commonwealth *v.* Kosloff, 5 Serg. & R. (Pa.) 545 (1816). There appears to be no force in the argument that, as there is no federal common law of crimes, the enact-

consuls. As it protects interests of the United States and of foreign governments, a consul cannot waive his immunity from state jurisdiction.[10]

On the termination of a diplomat's official position, his immunities continue for a reasonable period of preparation for departure, and then cease.[11] It is unlikely that the words of the statute would be so liberally construed as to give a consul a similar continuing exemption from state jurisdiction in cases involving his acts after he has ceased to hold his position. But do they give him such exemption in cases involving his unofficial [12] acts while consul? A recent case holds that they do not.[13]

The answer to the question depends on the implications of the statute, which in turn depend on the nature of the policy behind the statute. The provisions dealing with the subject may be regarded as inspired by a proper sense of the respect due consuls and of the danger of international complications[14] resulting from disputes in which they are involved. Congress may have considered it of the utmost importance to keep all proceedings against consuls in the hands of the Federal Government. On this view, the word "consuls" in the statute should be construed broadly. The necessity for respect and the danger of complications do not cease on the revocation of a consul's authority. His immunity from the process of state courts in cases involving his acts while consul ought to continue, at least for a reasonable time, after such a revocation.

On the other hand, it is probable that the legislative conception of the policy behind the inclusion of consuls with diplomats in the laws under discussion was largely the result of a popular confusion of the positions occupied by the two classes of foreign representatives.[15] The absence

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ment could not have been intended to deprive the states of jurisdiction of criminal cases against consuls. *Cf.* State *v.* De La Foret, 2 Nott & McC. (S. C.) 217 (1820), *contra*. It has been held that the provision did not entitle a consul to be released, on *habeas corpus*, in case of an arrest on a state court's warrant. *In re* Iasigi, 79 Fed. 751 (S. D. N. Y., 1897); Iasigi *v.* Van De Car, 166 U. S. 391 (1897). It has been suggested that the change in the statutes made in 1875 did not restore criminal jurisdiction over consuls to state courts. *In re* Iasigi, *supra*, at pp. 753–754.

[10] Davis *v.* Packard, *supra*; Durand *v.* Halbach, 1 Miles (Pa.) 46 (1835); Valarino *v.* Thompson, 7 N. Y. 576 (1853). See also Miller *v.* Van Loben Sells, 66 Cal. 341, 5 Pac. 512 (1885), where the change in the statutes was apparently overlooked. *Cf.* Hall *v.* Young, 3 Pick. (Mass.) 80 (1825), *contra*.

[11] See HERSHEY, DIPLOMATIC AGENTS AND IMMUNITIES, 199–204; 12 HARV. L. REV. 495.

[12] A consul is, of course, not liable, civilly at least, for acts done in his official capacity. Jones *v.* Le Tombe, 3 Dall. (U. S.) 384 (1798).

[13] People *v.* Savitch, 190 N. Y. Supp. 759 (1921). The consul was held indictable in the state court, after the revocation of his *exequatur* by the President, for crimes committed while consul. For the facts of this case, see RECENT CASES, *infra*, p. 763. For the effect of the revocation of an *exequatur*, see Coppell *v.* Hall, 7 Wall. (U. S.) 542, 553 (1868); Seidel *v.* Peschkaw, 27 N. J. L. 427, 430 (1859). See 1 OPPENHEIM, *op. cit.*, § 436. The recall of a consul ought to have no different effect in this respect from that of the revocation of an *exequatur;* except that it perhaps more clearly terminates a consul's claim to special consideration.

[14] See *In re* Dillon, *supra*. For an account of the difficulties in which this case involved the government, see 5 MOORE, INTERNATIONAL LAW DIGEST, 78–81. See also the first set of cases in note 8, *supra*.

[15] The misconception in question was strengthened and perhaps originated by some often quoted statements of Vattel. See VATTEL, LAW OF NATIONS, Bk. II, Ch. II, § 34.

of any discussion of the question, either in the Constitutional Convention or in Congress, would lend support to this view.[16] The actual position of consuls makes it unlikely that a legislature would deliberately extend to them any considerable immunities. They have no great international political importance. They are often nationals of the country to which they are representatives. Scattered in large numbers over the land, they are frequently engaged in a variety of private enterprises. The uncompensated inconvenience which the assertion of consuls' immunities may involve thus becomes a strong argument for a literal interpretation of the words of the statute creating them.[17] On such an interpretation, a consul's loss of his authority involves also a loss of all immunity from suit or prosecution in state courts.

THE MEANING OF "CLEAN HANDS" IN EQUITY — When may a defendant in equity, without a defense upon the merits, appeal to the doctrine of "clean hands"[1] to put his opponent out of court? Courts have long agreed that the plaintiff's alleged misconduct must have reference to the very matters in controversy,[2] but beyond this vague generalization, decisions offer no consistent guide. The demand for predicability in judicial decisions requires that the Chancellor's discretion be controlled by some more clear and definite principle. Situations may be classified as: (1) cases where the plaintiff is engaged in a continuing course of fraudulent or illegal conduct, more or less closely connected with the subject-matter of the suit; and (2) cases where the plaintiff's misconduct is at an end, and he seeks restoration of the *status quo*, or other affirmative relief.

In the first type, if the desired relief would further the wrongdoing, no matter against whom the latter is directed, it obviously ought to be denied. One need not here be concerned over the defendant's unearned victory. Justice is not served by substituting an injury to a third party for an injury to the plaintiff. Whether the judicial aid invoked will assist in effectuating a wrong may often be a question of degree, analo-

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[16] See FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. II, 173, 186, 424, 432–433, 576, 600–601, 661; Vol. III, 220; THE FEDERALIST, No. 80. The only reported reference to the matter in the debates on the original bill was made by Mr. Smith of South Carolina, in the House of Representatives. He expressed an intention to move to strike out the provision giving the district courts exclusive jurisdiction over consuls and vice-consuls. Nothing more is said of this motion. The bill passed containing the provision. See 1 ANNALS OF CONGRESS, 799. See 46 CONGRESSIONAL RECORD, 308, 1538, 3216–3220, 3760–3764, 3853, 3998–4008, 4012.

[17] See Valarino *v.* Thompson, *supra;* Iasigi *v.* Van De Car, *supra.* The inconveniences may arise in civil or criminal proceedings; they may be produced by mistakes of fact or of law; they may or may not be aggravated by a delay in claiming immunity until the outcome of a preliminary trial.

[1] "He who comes into equity must come with clean hands," see 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 399. Sometimes phrased, "He that hath committed iniquity shall not have equity," see FRANCIS, MAXIMS OF EQUITY, 5. For the sources of maxims in our law, see Roscoe Pound, "The Maxims of Equity," 34 HARV. L. REV. 809, 827-836.

[2] Lewis' Appeal, 67 Pa. St. 153 (1870); Kinner *v.* Lake Shore Ry. Co., 69 Ohio St. 339, 69 N. E. 614 (1903). See 1 POMEROY, *op. cit.*, § 399; BISPHAM, PRINCIPLES OF EQUITY, 9 ed., § 42.